RECORD
AND
BRIEF.

No. 15-1363

IN THE

Supreme Court of the United States

DENNIS HASTY AND JAMES SHERMAN,
Petitioners,

v.

AHMER IQBAL ABBASI, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS DENNIS HASTY AND JAMES SHERMAN

CLIFTON S. ELGARTEN
SHARI ROSS LAHLOU
KATE M. GROWLEY
CROWELL & MORING LLP
1001 Pennsylvania Ave., NW
Washington, D.C. 20004
(202) 624-2500
celgarten@crowell.com

Counsel for Dennis Hasty

JEFFREY A. LAMKEN
Counsel of Record
MICHAEL G. PATTILLO, JR.
ERIC R. NITZ
JAMES A. BARTA
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., NW
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

Counsel for James Sherman

(Additional Counsel Listed on Inside Cover)

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

SARA E. MARGOLIS
MOLOLAMKEN LLP
430 Park Ave., Floor 6
New York, N.Y. 10022
(212) 607-8160

DEBRA L. ROTH
JULIA H. PERKINS
SHAW BRANSFORD & ROTH
1100 Connecticut Ave., NW
Suite 900
Washington, D.C. 20036
(202) 463-8400

Counsel for James Sherman

TABLE OF CONTENTS

	Page
Introduction	1
Argument	3
I. The Second Circuit Improperly Extended *Bivens* to a New Context	3
A. This Case Presents a New *Bivens* Context	4
B. Special Factors Preclude *Bivens*' Extension	8
II. Hasty and Sherman Are Entitled to Qualified Immunity	11
A. The Complaint Does Not Plead Clearly Established Equal-Protection and Due-Process Violations	11
B. The Complaint Does Not Plead Clearly Established Fourth Amendment Violations	13
C. The Complaint Does Not Plead a Clear Violation of § 1985(3)	14
III. The Allegations Do Not Meet *Iqbal*'s Plausibility Requirement	15
A. The "Official" Conditions Due-Process and Equal-Protection Allegations Fall Short	15
B. Respondents Do Not Allege Plausible Fourth Amendment Claims Against Hasty and Sherman	19
C. The Complaint Does Not Plausibly Allege Hasty's Liability for "Unofficial" Conditions	19

TABLE OF CONTENTS—Continued

Page

Conclusion 24

TABLE OF AUTHORITIES

Page(s)

CASES

Arar v. *Ashcroft*, 585 F.3d 559 (2d Cir. 2009) 10

Ashcroft v. *Iqbal*, 556 U.S. 662 (2009) ..... *passim*

Baldwin v. *Reese*, 541 U.S. 27 (2004) 6

Bell Alt. Corp. v. *Twombly*, 550 U.S. 544 (2007) 16

Bell v. *Wolfish*, 441 U.S. 520 (1979) 13

Brecht v. *Abrahamson*, 507 U.S. 619 (1993) 5

Bush v. *Lucas*, 462 U.S. 367 (1983) 5, 10

Carlson v. *Green*, 446 U.S. 14 (1980) 5

Chappell v. *Wallace*, 462 U.S. 296 (1983) 4

Davis v. *Scherer*, 468 U.S. 183 (1984) 15

Elder v. *Holloway*, 510 U.S. 510 (1994) 15

Gaston v. *Coughlin*, 249 F.3d 156 (2d Cir. 2001) 13

Hodges v. *Stanley*, 712 F.2d 34 (2d Cir. 1983) 14

Lebron v. *Rumsfeld*, 670 F.3d 540 (4th Cir. 2012) 9

Mullenix v. *Luna*, 136 S. Ct. 305 (2015) 11

Reichle v. *Howards*, 132 S. Ct. 2088 (2012) 11, 13

Safford Unified Sch. Dist. No. 1 v. *Redding*, 557 U.S. 364 (2009) 14

Saucier v. *Katz*, 533 U.S. 194 (2001) 11, 14

TABLE OF AUTHORITIES—Continued

Page(s)

Sosa v. *Alvarez-Machain*, 542 U.S. 692 (2004) 3

White v. *Pauly*, No. 16-67, slip op. (Jan. 9, 2017) 11

Wilkie v. *Robbins*, 551 U.S. 537 (2007) 10

Williams v. *Greifinger*, 97 F.3d 699 (2d Cir. 1996) 13

Wilson v. *Libby*, 535 F.3d 697 (D.C. Cir. 2008) 9

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S. Const. amend. IV 13, 14, 19

U.S. Const. amend. VIII 5

42 U.S.C. § 1985(3) 15

Sup. Ct. R. 15.2 6

IN THE

Supreme Court of the United States

NO. 15-1363

DENNIS HASTY AND JAMES SHERMAN,

Petitioners,

v.

AIIMER IQBAL ABBASI, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS DENNIS HASTY AND JAMES SHERMAN

INTRODUCTION

Respondents all but abandon the decision below. They do not defend the Second Circuit's novel source-of-right/mechanism-of-injury test for determining whether a *Bivens* context is "new." Their central argument rests on the assertion that "there is nothing to distinguish" their claims "from thousands of similar claims brought against prison guards and supervisors every year." Resp. Br. 77-78. But that assertion, like respondents' approach to "context" generally, would have this Court disregard everything respondents allege (and the Second Circuit accepted) about this context and the special factors it implicates. Detained just after 9/11, respondents were *all*

classified by the FBI as "of interest" to its terrorism investigation. See Hasty/Sherman Pet. 3-4 (citing Complaint). BOP headquarters directed Hasty and Sherman to detain foreign nationals so designated in the most restrictive conditions permissible. Pet. App. 50a-51a. Until now, respondents claimed that following that dictate violated their rights because Hasty and Sherman "knew" the FBI terrorism classifications were mistaken. They urged (and the Second Circuit held) that clearly established law required local jailers, like Hasty and Sherman, to disregard FBI terrorism classifications if they thought they knew better than the FBI.

"Special factors" preclude *Bivens*' expansion to that new context. Congress, not the courts, is best situated to decide whether to create a damages action against jailers for not superseding policy judgments relating to national security and immigration in the wake of an unprecedented attack. Litigating cases like this one, moreover, can implicate sensitive intelligence information.

Respondents' claims likewise cannot survive qualified immunity or *Iqbal*. Respondents cite no authority clearly establishing that jailers were constitutionally compelled to disregard FBI terrorism designations based on their own putative assessments. And they plead no facts making it plausible that Hasty and Sherman acted on punitive or discriminatory animus given the lawful alternative explanation—that they were abiding by FBI classifications and BOP directives.

Accordingly, respondents seek to reinvent their case, arguing "the 'FBI terrorism designations' * * * do not exist on the face of the complaint or OIG reports." Resp. Br. 82. But the Complaint repeatedly acknowledges them. So do the OIG reports, incorporated into the Complaint. So did the Second Circuit. And respondents have

waived any contrary assertion. Respondents similarly overreach in arguing, for the first time, the official confinement conditions were clearly unconstitutional even if the designations were correct. Briefing on the merits in this Court is not the time to rewrite a compiaint.

Nor does respondents' claim against Hasty based on "unofficial conditions"—unauthorized misconduct by guards—survive scrutiny. Respondents failed to plead a plausible claim that Hasty, as MDC Warden, knew of line-level guard abuses not being addressed through normal channels, thus requiring his special intervention, and rendering him personally liable for not doing so.

ARGUMENT

I. THE SECOND CIRCUIT IMPROPERLY EXTENDED *BIVENS* TO A NEW CONTEXT

Respondents do not dispute that, for over 35 years, this Court has refused to extend *Bivens* to any new contexts. Hasty/Sherman Br. 21-24. Respondents invoke statutes from 1974, 1988, and 1996 to argue that Congress "ratified" *Bivens*. Resp. Br. 21-23. But this Court has declined to extend *Bivens* to new contexts despite those enactments. See Hasty/Sherman Br. 21-22. Judicial creation of implied damages remedies remains "disfavored," *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009), because "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases," *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 727 (2004).

Besides, respondents offer no reason to believe any supposed ratification licenses *Bivens*' extension to *new* contexts, which is what respondents seek here. Any "ratification" would also incorporate the longstanding

principle that courts should not extend *Bivens* if "special factors" counsel hesitation. Special factors preclude *Bivens*' extension here.

A. This Case Presents a New *Bivens* Context

Respondents argue that special-factors analysis is unnecessary because this case does not involve a "new context." Resp. Br. 23. But they do not defend the Second Circuit's source-of-right/mechanism-of-injury test. See *id.* at 25 n.4. Instead, they propose a three-part test never adopted by any court. *Id.* at 24. Contrast Hasty/Sherman Br. 24. Respondents' new test defies the purpose of "new context" inquiry: to determine whether prior decisions have *already* "take[n] into account" any circumstances that might raise "'special factors counseling hesitation,'" *Chappell* v. *Wallace*, 462 U.S. 296, 298 (1983), or whether the proposed action "presents legal and factual circumstances *not* present" in earlier cases, making "a new [special-factors] assessment * * * necessary," Pet. App. 94a (Raggi, J. dissenting); Hasty/Sherman Br. 24.

1. Respondents' effort to apply their test illustrates its defect: It ignores *every* element of context that may raise special factors not considered in prior cases. As explained previously, Hasty/Sherman Br. 35-41, this case does not merely involve the detention of foreign nationals, unlawfully in the U.S., in 9/11's immediate wake. Respondents seek to hold local jailers liable for *not* disregarding FBI "of interest" classifications and the corresponding confinement conditions required by BOP. The jailers, they assert, should have followed their own beliefs about respondents' terrorism connections because they supposedly "knew" the FBI (the agency conducting the 9/11 investigation) was mistaken. Pet. App. 51a-54a. The very nature of that theory—that lower-level jailers

should overrule policy judgments and classifications potentially involving sensitive intelligence information in connection with the confinement of foreign nationals following an unprecedented terrorist attack—makes clear the context is new.

Respondents identify *no* decision of this Court that evaluated "special factors" in a remotely similar context. They do not explain how the special-factors analysis in garden-variety Eighth Amendment cases, *e.g.*, *Carlson* v. *Green*, 446 U.S. 14 (1980), could have evaluated them. The court of appeals cases they cite (Resp. Br. 26-29, 75-76) are no better, and most merely *assumed* a *Bivens* remedy was available. See *Brecht* v. *Abrahamson*, 507 U.S. 619, 631 (1993) (cases that "assume[ ]" a legal issue lack *stare decisis* effect). Respondents contend (at 77-78) that "there is nothing to distinguish" their claims "from thousands of" ordinary prisoner suits only by assuming away everything that distinguishes this context.

Respondents concede a context is "new" if it "creates previously unexplored separation of powers concerns." Resp. Br. 24. But they overlook the separation-of-powers concern this Court must evaluate: When courts decide the propriety of a judicially implied damages action, the question is not "the merits of the particular remedy sought"; it is "*who should decide*" whether to provide a remedy and define its boundaries—Congress or the courts. *Bush* v. *Lucas*, 462 U.S. 367, 380 (1983) (emphasis added). Because no prior decision has decided *Bivens* should be extended in remotely comparable circumstances, this context is unquestionably new.

2. Perhaps for those reasons, respondents attempt to rewrite their Complaint. They disavow the grounds on which they prevailed below—that local jailers were required to overrule FBI terrorism classifications in favor

of their own judgments. See Pet. App. 51a-54a; Hasty/Sherman Br. 10-12. Instead, they now claim that "the 'FBI terrorism designations' Petitioners invoke do not exist on the face of the complaint or OIG reports." Resp. Br. 82. But that defies the Complaint, the OIG reports, the Second Circuit's decision, and respondents' briefing in this Court.

The certiorari petitions clearly stated that, "[b]efore being sent to MDC, *respondents were designated by the FBI as 'of interest'* or 'high interest' to the 9/11 investigation." Hasty/Sherman Pet. 3-4 (emphasis added) (citing Complaint's allegations); see Ashcroft Pet. 3; Ziglar Pet. 7. They argued the significance of the FBI classifications at length. Hasty/Sherman Pet. i, 2, 15, 16, 19, 24, 28-29, 31. Respondents' brief in opposition *never* disputed the designations. To the contrary, respondents told this Court they were on a "list of individuals *designated 'of interest'* to the 9/11 investigation *by the New York field office of the FBI*." Br. in Opp. 6 (emphasis added). Any assertion that the designations "do not exist on the face of the complaint" is waived. See Sup. Ct. R. 15.2; *Baldwin* v. *Reese*, 541 U.S. 27, 34 (2004).

The assertion is also wrong. The Complaint alleges that respondents were identified as "of interest":

- "Abbasi was held as 'of interest' to the PENTTBOM investigation." Pet. App. 302a (¶ 143).
- "FBI headquarters stated that Mehmood was 'of interest' to the FBI." Pet. App. 309a (¶ 169).
- "Benatta was identified as 'of special interest' by the Joint Terrorism Task Force." Pet. App. 315a (¶ 187).
- Khalifa was "detained as 'of interest.'" Pet. App. 322a (¶ 211).

- "FBI Headquarters listed Hammouda as 'of interest.'" Pet. App. 326a-327a(¶226).
- "Bajracharya was 'of active investigative interest to the FBI.'" Pet. App. 328a-329a(¶233).

The assertion that the designations are not "[i]n the * * * OIG Reports" incorporated into the Complaint, Resp. Br. 82; see *id.* at 2-3; Pet. App. 253a(¶3 n.1), is also incorrect. The OIG report says:

- "[T]he *FBI's initial 'interest' classification* had an enormous impact on the detainees because it determined [where] they would be housed * * *." J.A. 304 (emphasis added); see J.A. 320-321.
- The BOP reported "*the FBI* * * * ma[de] an initial assessment of a detainee's possible links to terrorism," and "the BOP accepted this assessment, since the BOP normally takes 'at face value' *FBI determinations* that detainees had a potential nexus to terrorism and therefore were 'high risk.'" J.A. 241 (emphasis added).
- The "BOP Director" reported "th[e] *designation[s]* resulted from *the FBI's assessment*" and were "not the BOP's 'call.'" J.A. 220 (emphasis added); see J.A. 291 ("BOP played no role * * *. [T]hese decisions were made by the FBI * * *.").

The Second Circuit recognized the FBI's terrorism designations. Under the heading "The New York List and *the 'Of Interest' Designation*," Pet. App. 16a (emphasis added), the panel explained that "aliens encountered and arrested pursuant to a PENTTBOM lead in New York"—like respondents—"were designated 'of interest' (or special interest)," *id.* at 18a; *see id.* at 36a. That "'of interest' designation by an FBI agent," the court observed, "had significant implications." *Id.* at 17a.

Judge Raggi thus stated, "it is *undisputed* that *the FBI had designated each MDC Plaintiff* as a person 'of high interest' or 'of interest' * * *." *Id.* at 146a (emphasis added).

Respondents elsewhere concede that the "FBI * * * identif[ied] them as 'of interest' to the 9/11 investigation." Resp. Br. 51 (citing Pet. App. 267a-268a(¶47)); see *id.* at 56 (urging "the FBI" lacked sufficient information "prior to identifying them as 'of interest' to the 9/11 investigation"). Respondents prevailed below on the theory that Hasty and Sherman were constitutionally obligated to disregard FBI classifications because they "knew" they were wrong. Respondents cannot now reverse course and deny the classifications they previously pleaded and pressed on this Court.

B. Special Factors Preclude *Bivens*' Extension

1. Respondents' argument and the judgment below rest on the view that restrictive conditions were improper despite the FBI terrorism designations because Hasty and Sherman eventually became "'aware that the FBI had not developed any information'" tying respondents "'to terrorism,'" and thus should have followed their own assessments instead. The obvious implications of that contention—that jailers should face personal liability for not second-guessing policy and investigative decisions by expert agencies on matters of national security and immigration in the wake of an unprecedented terrorist attack—alone bespeak the need for "hesitation." Congress, not the courts, is best positioned to determine whether to create such a cause of action and to define its boundaries.

Respondents agree that "significant hesitation" is warranted before authorizing a *Bivens* action "interfering with the military chain-of-command." Resp. Br. 44.

They offer no reason why hesitation is less warranted before interfering in the law-enforcement command chain following a terrorist attack. Their *amicus* urges that BOP wardens are not "obligat[ed] to follow assessments from a different agency component like the FBI." Br. *Former Correctional Officers* 28. But that misunderstands the Complaint and the facts. Hasty and Sherman did not take direction from the FBI. The *BOP* required them to impose the most restrictive conditions permissible on detainees designated "of interest" by the FBI. Pet. App. 50a-51a; see p. 2, *supra*. Besides, whether to extend *Bivens* does not depend on whether jailers must follow FBI terrorism classifications. It depends on whether this Court should create a damages action against them for having done so.

2. Moreover, unlike the "thousands of" prisoner suits involving ordinary misconduct claims in ordinary circumstances respondents invoke, cases like this one could require discovery "into matters of * * * sensitive intelligence information." *Wilson* v. *Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008), cert. denied, 557 U.S. 919 (2009). As we explained, Hasty/Sherman Br. 30-31 & n.6, respondents must *prove* (and Hasty and Sherman may dispute) that the FBI in fact lacked information connecting them to terrorism, and that Hasty and Sherman "knew" it. That implicates the need to discover potentially sensitive intelligence information. Given the obvious risks, Congress is best equipped to determine whether to authorize such litigation and establish "guidelines to ensure that litigation does not come at the expense of national security concerns." *Lebron* v. *Rumsfeld*, 670 F.3d 540, 555 (4th Cir. 2012); see Ashcroft Br. 26-27. Other than denying the existence of the FBI's classifications, respondents offer no response.

Respondents urge (at 41) that "[f]oreign relations interests" favor *Bivens*' extension here because it may foster better treatment of Americans abroad. But the *existence* of "foreign relations interests"—matters "'so exclusively entrusted to the political branches of government'"—counsels against judicial innovation. Hasty/Sherman Br. 32. The potential for lawsuits, which might involve intelligence information, could also deter foreign governments from "sharing intelligence resources to counter terrorism." *Arar* v. *Ashcroft*, 585 F.3d 559, 576 (2d Cir. 2009) (en banc); Hasty/Sherman Br. 31. Congress, rather than the courts, is the appropriate institution to assess and balance such risks.

3. Respondents' invocation of *Korematsu* thus is misplaced. Whether special factors preclude judicial creation of a damages action does not turn on the propriety of the executive action being challenged. It turns on "who should decide" to create the cause of action—Congress or the courts. *Bush*, 462 U.S. at 380.

For that reason, this Court cannot resolve this case by "'weigh[ing] reasons for and against the creation of a new cause of action,'" the way common law judges might. Resp. Br. 34 (quoting *Wilkie* v. *Robbins*, 551 U.S. 537, 554 (2007)). That may make sense when the special-factors analysis is focused on whether "it would be good policy" to have a damages claim, *Bush*, 462 U.S. at 390, such as whether the cause of action would be "workable," *Wilkie*, 551 U.S. at 555. But the question here is *who*—Congress or the courts—is best situated to decide whether to create that cause of action. It would make no sense for the Court to hold that special factors make this a context where *Congress* must decide, but then create the action itself anyway based on its own policy views.

II. HASTY AND SHERMAN ARE ENTITLED TO QUALIFIED IMMUNITY

A. The Complaint Does Not Plead Clearly Established Equal-Protection and Due-Process Violations

Qualified immunity may be denied only if it would have been "clear to a reasonable officer that *his conduct* was unlawful *in the situation he confronted.*" *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001) (emphasis added). Here, the dispositive question is whether "every 'reasonable official would'" have understood that, as jailers, Hasty and Sherman were constitutionally obligated to overrule FBI designations and BOP policy based on their own supposed beliefs about respondents' terrorism connections. *Reichle* v. *Howards*, 132 S. Ct. 2088, 2093 (2012). No such obligation exists. Cf. *White* v. *Pauly*, No. 16-67, slip op. 7 (Jan. 9, 2017) (per curiam).

The panel asked instead whether it was "clearly established that * * * a condition of pretrial detention not reasonably related to a legitimate governmental objective is punishment" that violates detainees' "constitutional rights." Pet. App. 58a. That defies this Court's warning "'not to define clearly established law at a high level of generality.'" *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015); Hasty/Sherman Br. 36-39. Respondents do not contend otherwise.

Respondents again deny the FBI designated them "of interest" to the 9/11 investigation, Resp. Br. 82-84, urging that the FBI stated it "*might* [have been] interested in them," *id.* at 87. But the FBI's "of interest" designations are documented in respondents' Complaint, the OIG reports, and respondents' briefs. See pp. 5-8, *supra*. Respondents' insistence (at 87) that "some of the conditions" were "clearly unconstitutional in any circum-

stance"—even if the FBI designations were correct—is similarly foreclosed. Citing the decision below, the certiorari petitions stated there was *no dispute* that the official confinement conditions were lawful if respondents in fact had terrorism connections; respondents disputed only whether there was reason to suspect such connections. Hasty/Sherman Pet. 4; Ashcroft Pet. 22 ("no dispute that * * * restrictive conditions of confinement * * * could be lawfully imposed" where "the government had 'individualized suspicion of terrorism'"). Respondents disputed having *conceded* that point, but represented that the confinement conditions' constitutionality for detainees with suspected terrorism ties "is not relevant to these Petitions." Br. in Opp. 29 n.11. Respondents never explain how they can defend the judgment below on a theory they disclaimed as "not relevant."

Because the issue was undisputed, the panel majority agreed that designing and implementing the "'restrictive and secure conditions' alone would not sustain liability for" Hasty or Sherman. Pet. App. 50a-51a. "[N]ational security concerns," the panel found, "could justify detaining those individuals with suspected ties to terrorism *in these challenged conditions for [a] litany of reasons*," including those "articulated by [Judge Raggi's] dissent." *Id.* at 46a (emphasis added); see *id.* at 143a-144a (Raggi, J. dissenting). On petition for rehearing en banc, five more judges agreed. *Id.* at 241a (adopting dissent). It cannot be that "every 'reasonable official would'" have understood the conditions of confinement *themselves* were unconstitutional, "in any circumstance," where

every judge to consider the matter has concluded otherwise. *Reichle*, 132 S. Ct. at 2093.[1]

Respondents urge that, even if the confinement conditions were permissible "in light of the FBI's 'interest,'" a few respondents remained in those conditions "*after* they were cleared by the FBI of any connection to terrorism." Resp. Br. 89. But the Complaint nowhere alleges that Hasty or Sherman knew those individuals had been cleared but ordered detention nonetheless. See Pet. App. 315a-316a, 322a, 326a-327a(¶¶188, 211, 226, 227). The OIG report (incorporated into the Complaint) attributes such occurrences to "delay in notifying the MDC" of the clearances. See J.A. 292-293, 296. No clearly established law required officers to act on clearances not communicated to them.

B. The Complaint Does Not Plead Clearly Established Fourth Amendment Violations

Even apart from qualified immunity, prison administrators are entitled to "wide-ranging deference" in connection with "institutional security." *Bell* v. *Wolfish*, 441 U.S. 520, 547 (1979). Tragic experience had shown the risk of terrorism suspects obtaining contraband and inflicting life-threatening harm. See Hasty/Sherman Br. 42; Pet. App. 161a. Respondents' contention that the

---

[1] Nor is it clear the specific conditions respondents invoke (at 84-85) would always be unconstitutional as alleged. The right to "exercise" is subject to a "safety" exception, *Williams* v. *Greifinger*, 97 F.3d 699, 707 (2d Cir. 1996), and exercise here was authorized five days a week, Hasty/Sherman Pet. App. 469a. Toilet paper and "hygiene items were passed out and then retrieved daily," Pet. App. 298a(¶130); Hasty/Sherman Pet. App. 472a. And *Gaston* v. *Coughlin*, 249 F.3d 156, 165 (2d Cir. 2001), involved living areas "near or well below freezing" for five months, not general allegations of "cold," Pet. App. 297a(¶127).

supposed strip-search policy was plainly unlawful ignores that circumstance. And while respondents urge the alleged policy permitted strip searches "'when there was no opportunity to acquire contraband,'" Resp. Br. 90, the searches identified in the Complaint all occurred after intervening events, Pet. App. 292a-293a(¶112); J.A. 391-393. Given circumstances and prior experience, respondents fail to show that every "reasonable officer" would have known the alleged policy was unlawful "in the [immediate post-9/11] situation" Hasty and Sherman "confronted." *Katz*, 533 U.S. at 202.[2]

Judge Raggi's agreement—joined by five other judges, Pet. App. 241a—underscores the point. *Id.* at 158a-162a. Even if "the fact of a dissenting opinion * * * does not itself mean qualified immunity must apply," Resp. Br. 90, it is probative of whether "no reasonable officer" could have thought the conduct lawful. And *Safford Unified School District No. 1* v. *Redding*, 557 U.S. 364 (2009), says judicial disagreements will not "automatically render the law unclear if we"—*i.e.*, this Court—"have been clear." *Id.* at 378. This Court has never held, much less clearly held, the Fourth Amendment prohibits such measures when dealing with foreign nationals identified as "of interest" to an FBI terrorism investigation.

C. The Complaint Does Not Plead a Clear Violation of § 1985(3)

Respondents do not dispute that, in 2001, it was far from clear that the conduct alleged here would violate § 1985(3). It was not clear that § 1985(3) applied to federal officers. Moreover, the intra-enterprise conspiracy doctrine might preclude the requisite conspiracy. See

---

[2] *Hodges* v. *Stanley*, 712 F.2d 34, 35 (2d Cir. 1983), did not involve putative terrorism suspects.

Hasty/Sherman Br. 43-44; Pet. App. 83a & n.46. Respondents argue that applying the intra-enterprise conspiracy doctrine would be "inappropriate" here. Resp. Br. 92-93. But they cite no case "clearly establish[ing]" their view, and precedent pointed the other way. Hasty/Sherman Br. 44.

Respondents urge (at 92) that conduct clearly violating § 1985(3) is unnecessary if there is a clear equal-protection violation. *Davis* and *Elder* say the opposite: "[O]fficials become liable for damages only to the extent that there is a clear violation of *the statutory rights that give rise to the cause of action for damages*"—here, § 1985(3). *Davis* v. *Scherer*, 468 U.S. 183, 194 n.12 (1984) (emphasis added); see *Elder* v. *Holloway*, 510 U.S. 510, 515 (1994) (the "clearly established right" must "be the federal right on which the claim for relief is based"). Indeed, while § 1985(3) requires a *conspiracy* by covered persons, no actual equal-protection violation is required.[3]

III. The Allegations Do Not Meet *Iqbal*'s Plausibility Requirement

A. The "Official" Conditions Due-Process and Equal-Protection Allegations Fall Short

The Second Circuit's *Iqbal* analysis turned on the following proposition: Although Hasty and Sherman "*initially* believed that they would be housing only those detainees who were suspected of ties to terrorism," they "*eventually knew* that the FBI lacked any individualized suspicion for many of the detainees that were sent to the ADMAX SHU." Pet. App. 52a (emphasis added). Absent

---

[3] While § 1985(3) prohibits "conspir[acies]" to deny "equal protection," it allows suit if an overt act "*injure[s]*" someone "in his person or property, *or deprive[s]* [him] of * * * any *right or privilege*." 42 U.S.C. § 1985(3) (emphasis added).

individualized suspicion, the panel ruled, the conditions were potentially "punitive," *id.* at 45a-46a, and "discriminatory," *id.* at 68a-69a.

1. That theory does not address the "'obvious alternative explanation'"—that Hasty and Sherman were following FBI classifications and BOP directives, not acting punitively or discriminatorily. Hasty/Sherman Br. 47-48; see *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 567-568 (2007) (conspiracy not plausible given "obvious alternative explanation" for conduct). Apart from their failed assertion that "the 'FBI terrorism designations' * * * do not exist," see pp. 5-8, *supra*, respondents have no answer.

The notion that Hasty and Sherman "knew" the FBI designations were wrong is likewise not plausibly pleaded. The Complaint alleged that Hasty and Sherman "knew" because the "updates" they received, providing why each detainee "was arrested" and "'evidence relevant to the danger he might pose' to the" institution, did not tie respondents to terrorism. Pet. App. 52a; see *id.* at 277a(¶69). But the Complaint offers no facts suggesting that jailers would believe the FBI was sending into prison, for jailer review, *all* FBI intelligence on detainee terrorism connections. Hasty/Sherman Br. 48-49. Nor does it offer any reason why Hasty and Sherman thought they had superior competence to the FBI. *Ibid.*; cf. J.A. 135. Rather, "it was believed that FBI Headquarters would have a broader perspective on the PENTTBOM investigation and would be in a better position to make an assessment of whether" a detained alien "was 'of interest' to the investigation." J.A. 106. "BOP accepted [the

FBI's] assessment," taking FBI determinations "'at face value.'" J.A. 241; see J.A. 220; pp. 6-7, *supra*.[4]

Respondents contend the Complaint was "not required" to explain "why particular defendants would believe particular things." Resp. Br. 83-84. To overcome qualified immunity on the theory that the jailers "knew" FBI terrorism designations were wrong, however, the Complaint must offer factual allegations making such knowledge plausible. See *Iqbal*, 556 U.S. at 680 (rejecting allegation that officials "'knew of' * * * harsh conditions of confinement"). The Complaint does not.

2. On discriminatory intent, respondents double-down on the panel-invented theory that intent could be inferred from a memorandum respondents characterize as "false." Resp. Br. 85-86; see *id.* at 86 ("'false document'"), 88 ("false memorandum"); Pet. App. 53a. According to respondents, the memorandum "falsely state[d]" that *MDC staff* made individual terrorism designations. Resp. Br. 85. Respondents accuse Hasty and Sherman of having "lied" in the memorandum "to conceal their failure to follow BOP policy," *id.* at 76, and urge that "mendacity" supports discriminatory intent, *id.* at 86.

We invite the Court to review the memorandum, which is neither mendacious nor false. Hasty/Sherman Pet. App. 466a-477a. It is dated *three days* after the 9/11 attacks, *before* any respondent *arrived* at MDC. It cannot plausibly be interpreted as saying that *MDC staff* had conducted individualized assessments for detainees

---

[4] Respondents now state the "updates explain[ed] how each detainee *was connected to the 9/11 investigation*" or "*came to be considered 'of interest.'*" Resp. Br. 13, 82 (emphasis added). But the *Complaint* alleges the MDC received the reason for "arrest"—immigration violations—*not* connections to the FBI terrorism investigation. Pet. App. 277a (¶ 69).

who had not even arrived. Hasty/Sherman Br. 50-51 & n.15. Respondents offer no response. Nor can a memorandum dating before respondents' arrival plausibly "cover up" any failure to conduct periodic, individualized re-assessments for not-yet-arrived detainees. Resp. Br. 20.

The memorandum's text refutes any suggestion that it falsely represents that *MDC staff* had "classified the 'suspected terrorists' as 'High Security.'" Pet. App. 53a; *id.* at 279a (¶74). It states that MDC staff "have determined the suspected terrorists, *have been* classified as 'High Security' inmates"—presumably by the FBI. Hasty/Sherman Br. 50 (quoting Hasty/Sherman Pet. App. 467a) (emphasis added). There is no representation that MDC staff did the classifying. Respondents' assertion (at 86 n.21) that the comma after "terrorists" renders the statement "difficult to read" ignores basic grammar: Even with the comma, the memorandum uses passive voice, stating MDC staff determined that the detainees "*have been* [so] classified." And the memorandum dates from a time—three days after 9/11—when (even according to the Second Circuit) Hasty and Sherman "*initially*" believed the FBI classifications lawful. Pet. App. 52a.

The memorandum also directs MDC staff to treat the detainees with "[p]rofessionalism * * * at all times." Hasty/Sherman Br. 51 (quoting Hasty/Sherman Pet. App. 466a). It prohibits "humiliat[ing] and provok[ing]" the detainees. *Ibid.* That hardly evidences discriminatory intent. Respondents again offer no response.

The notion that the memorandum falsely sought to "cover up" not-yet-existing violations of BOP regulations involving not-yet-arrived detainees falls short in another respect. Respondents concede that "*BOP* ordered the detainees held in restrictive confinement." Resp. Br. 6-7

(emphasis added); see Pet. App. 50a. To the extent any "procedural protections" required periodic MDC review of detainee "security risks" in this context at all—the regulations relate to "administrative detention," not the special case of suspected terrorism detainees, Resp. Br. 84—BOP had determined that FBI "of interest" classifications, when still outstanding, provided the necessary basis for continuing restrictive conditions; "of interest" detainees were to remain in restrictive conditions until cleared by the FBI. See, *e.g.*, J.A. 230 ("policy that all September 11 detainees were to be held in the most restrictive conditions"); J.A. 295 ("instructions from BOP Headquarters" to "confine the September 11 detainees under secure conditions").

B. Respondents Do Not Allege Plausible Fourth Amendment Claims Against Hasty and Sherman

Respondents do not identify any allegations establishing Hasty's and Sherman's personal involvement in inappropriate strip-searches. They repeat the panel's error of inferring Hasty's and Sherman's involvement from a wholly conclusory allegation that Hasty and Sherman directed or approved *other* conditions of confinement. Pet. App. 76a, 279a(¶75). Without pleading facts that could substantiate even the terms of the putative unwritten strip-search policy, the Complaint does not come close to showing Hasty and Sherman were responsible for it. Hasty/Sherman Br. 52-53; pp. 13-14 & n.2, *supra*.

C. The Complaint Does Not Plausibly Allege Hasty's Liability for "Unofficial" Conditions

Respondents also liken their "unofficial conditions" claims against Hasty to "thousands of similar claims brought against prison guards and supervisors every

year." Resp. Br. 77-78. If the unofficial conditions claims were asserted only against guards who engaged in abuse, or their immediate supervisors, that might be true. But the claims here represent a strained effort to extend personal liability for particular incidents of unauthorized, line-level abuse, up the command chain to Hasty, the warden during the initial period (from September 11, 2001 until spring of 2002). Pet. App. 259a(¶24). While the Complaint alleges Hasty's knowledge of abuse, it fails to connect specific knowledge, at any particular time, to the specific instances of abuse that form the basis of respondents' claims.

The Complaint, moreover, expressly incorporates two OIG reports. Pet. App. 253a(¶3 n.1); J.A. 34-416. Its conclusory assertions must be evaluated in light of those reports' specifics. While the reports provide many examples of abuse by individual guards, *e.g.*, J.A. 336-416, they found abuse was not "engaged in or condoned by anyone other than the correctional officers who committed it," J.A. 299 n.130.[5] With the exception of when guards mistakenly withheld prison handbooks, see p. 23, *infra*, neither the OIG reports nor the Complaint identify *any* misconduct not processed consistent with BOP policies.

1. Officials are personally liable only where they violate the Constitution "through [their] own individual actions." *Iqbal*, 556 U.S at 676. Consequently, respondents must allege sufficient facts showing not just that Hasty was aware of abuses, but that he knew they would not be properly addressed through ordinary processes, thus requiring his personal intervention. Conclusory

---

[5] Respondents (at 79) dismiss that statement in the first OIG report because the investigation was ongoing. But the second OIG report comprehensively examined "unofficial abuse" and nowhere contradicted that finding. J.A. 336-416.

allegations will not suffice. *Id.* at 678. The panel's approach below bears no resemblance to this Court's scrupulous review of the allegations in *Iqbal*. The panel failed to evaluate the Complaint's conclusory assertions in light of the administrative distance between Hasty—who ran a 2,600-inmate prison, J.A. 219 n.88—and the misconduct many levels beneath him. An allegation with sufficient "heft" to plausibly support deliberate indifference by a direct supervisor will not necessarily suffice for those further removed, who must rely on others to bring anything requiring special intervention to their attention.

Respondents urge that "Hasty willfully blinded himself to abuses by neglecting to make rounds as required by BOP policy." Resp. Br. 79. But the administrative distance between the warden and the ADMAX unit predated 9/11, see J.A. 232, and could not have been designed to insulate Hasty from responsibility. As we pointed out (Hasty/Sherman Br. 55-56), the Captain—"the highest-ranking correctional officer with direct responsibility for custody operations in the ADMAX SHU"—reported to the Associate Warden, who in turn reported to Hasty. See J.A. 230 n.95. The Captain had "responsibility for supervising all" officers in the ADMAX. Pet. App. 261a(¶27); see J.A. 232. Beneath him was a "Lieutenant * * * directly responsible for supervisi[ng]" staff in "the [ADMAX] unit," who made rounds and reviewed the logs. Pet. App. 261a(¶¶27-28); see Hasty/Sherman Pet. App. 467a. The Associate Warden also made rounds. Pet. App. 260a(¶26). With responsible deputies making rounds, the MDC's head does not exhibit "deliberate indifference" by not making rounds himself (if that were true). Respondents offer no answer.

2. Respondents' generalized assertion that Hasty was "'made aware'" of abuses (at 79-80) is fatally conclu-

sory. Respondents do *not* allege that *any* officials in charge of the unit suggested that any matter required his intervention or attention outside the ordinary course. Although guard misconduct occurred, the Complaint *acknowledges* that the BOP's Office of Internal Affairs, the FBI, and OIG investigated allegations of abuse. See Pet. App. 291a(¶107). Those investigations belie any contention that grievances were not processed through established channels (which the Complaint fails to allege in any event). Respondents do not allege any of those investigators called upon Hasty to undertake action he was not already taking.

In rejecting unofficial-conditions claims against Sherman, the Second Circuit recognized that the generalized assertion that supervisors "ignor[ed] direct evidence of such abuse, including logs and other official documents, videotapes, and detainee complaints" was insufficient. Pet. App. 280a(¶77) (asserting that "[a]ll the MDC Defendants" had such knowledge); see *id.* at 57a. Such allegations did not suffice, even combined with the claim that he allowed "'subordinates to abuse [respondents] with impunity'" and "'made rounds on the ADMAX SHU and was aware of conditions there.'" *Id.* at 57a.

Respondents cannot invoke similarly vague generalities against Sherman's superior, even further removed from misconduct. Prisoners assert grievances every day, and there are established procedures for addressing them. Knowledge of claimed abuse is insufficient to show a warden knew his personal intervention was required. The Complaint makes no effort to connect any specific information ostensibly known to Hasty to any preventable abuse suffered by any respondent—for example, there is no allegation Hasty knew a guard had abusive propensities, yet failed to prevent him from abusing

respondents. And respondents entirely abandon the Second Circuit's factually erroneous suggestion that the installation of video cameras somehow supports allegations of knowledge. Hasty/Sherman Br. 57.[6]

3. Respondents portray other allegations as more "detailed," Resp. Br. 79, but respondents' characterizations bear little resemblance to the allegations—particularly in light of facts in the incorporated OIG reports. For example, respondents conclusorily allege that "Hasty * * * ma[de] it difficult for detainees to file complaints." *Id.* at 80. Hasty, they urge, "barr[ed] them from normal grievance and oversight procedures." *Id.* at 8. Not so. The MDC had a system for addressing grievances, set forth in a handbook to be given each detainee. J.A. 239-240, 276-278. There is no suggestion that any grievance presented by a detainee was not processed in accordance with those procedures. The impediment cited in the Complaint was some guards' failure to allow detainees to keep those handbooks—based on an apparent (and promptly corrected) misinterpretation of policies concerning allowable reading material. Pet. App. 301a (¶ 140); J.A. 276-278 & n.124, 299-300.[7] The Complaint *nowhere* alleges that *Hasty* ordered, knew of, or was involved in that conduct—let alone that it was part of a plan to "bar" grievances.

Finally, respondents urge (at 80) that staff reporting abuse were harassed or called "snitches," and that Hasty

---

[6] Respondents assert (at 9) that "[v]ideotapes that likely showed abuse were destroyed." But there is no allegation Hasty had control over the tapes. J.A. 404-407.

[7] The policy was amended within a month. J.A. 278. Respondents assert Hasty bears "some" blame for the prior, ambiguous policy. Resp. Br. 80. But "some" blame falls short of a purposeful effort to "bar" grievances.

"encouraged * * * harsh treatment * * * by himself referring to [respondents] as terrorists." See Pet. App. 57a. As to the former, the Complaint does not allege that *Hasty* called anyone a "snitch," or knew others did—let alone that he condoned it. Hasty/Sherman Br. 56-57.

That leaves the allegation that Hasty used the term "terrorists." But where, to whom, when, and the circumstances are unspecified—as well as whether he included the modifier "suspected." The only document respondents cite refers to detainees as "suspected terrorists," Hasty/Sherman Pet. App. 466a, which was consistent with their designation, with this Court's shorthand, see *Iqbal*, 556 U.S. at 683, and with how (according to respondents) higher officials described them to Hasty, Resp. Br. 6. Generally alleging the term's use in unspecified contexts, at unspecified times, cannot plausibly support the claim that Hasty encouraged, and is individually responsible for, otherwise unauthorized abuses by individual guards. The "unofficial conditions" claims cannot be sustained.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

CLIFTON S. ELGARTEN
SHARI ROSS LAHLOU
KATE M. GROWLEY
CROWELL & MORING LLP
1001 Pennsylvania Ave., NW
Washington, D.C. 20004
(202) 624-2500
celgarten@crowell.com

Counsel for Dennis Hasty

JEFFREY A. LAMKEN
Counsel of Record
MICHAEL G. PATTILLO, JR.
ERIC R. NITZ
JAMES A. BARTA
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., NW
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

SARA E. MARGOLIS
MOLOLAMKEN LLP
430 Park Ave.
New York, N.Y. 10022
(212) 607-8160

DEBRA L. ROTH
JULIA H. PERKINS
SHAW BRANSFORD & ROTH
1100 Connecticut Ave., NW
Suite 900
Washington, D.C. 20036
(202) 463-8400

Counsel for James Sherman

January 2017